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No. 80-75

In the Supreme Court of the United States

OCTOBER TERM, 1979

KECO INDUSTRIES, INC., PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner was entitled to summary judgment in the Commission's enforcement action where the record, including a statistical workforce analysis prepared by petitioner as part of an affirmative action plan, disclosed evidence of sex discrimination affecting women other than the charging party (with whose claim the Commission's enforcement action was consolidated).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 617 F. 2d 443. The orders of the district court (Pet. App. 11a-14a) are reported at 22 Fair Empl. Prac. Cas. 485.

JURISDICTION

The judgment of the court of appeals (Pet. App. 9a) was entered on March 20, 1980. A petition for rehearing was denied on April 18, 1980 (Pet. App. 10a). The petition for a writ of certiorari was filed on July 17, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1970, Lena Grimes filed a charge with the Equal Employment Opportunity Commission against Keco Industries, Inc., claiming that Keco had discriminated against her on the basis of sex, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* (Pet. App. 2a). Grimes alleged that although she had performed the job of buyer, she had been paid a salary lower than that paid to male buyers (*ibid.*).

During the EEOC's investigation of the Grimes charge, it was given access to workforce data contained in an affirmative action program Keco had prepared in order to comply with Exec. Order No. 11246, 30 Fed. Reg. 12319 (1965), as amended, and Order No. 4, 41 C.F.R. Part 60-2 (1971) (Pet. 2-3).[1] The affirmative action program was designed by Keco to "develop, direct and carefully

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[1]Exec. Order No. 11246 (Pet. App. 17a-28a) prohibits government agencies from entering into contracts with firms that discriminate in employment. Order No. 4 (Pet. App. 32a-41a) requires a contractor to "develop a written affirmative action compliance program for each of its establishments." 41 C.F.R. 60-2.1 (1971).

monitor a program concerned with the employment, training and retention of *minority* and disadvantaged persons" (J.A. 76; emphasis added).[2] See Part III of Keco's affirmative action program plan (J.A. 77-78). Similar affirmative action features on behalf of women were not included in the plan.

The workforce data included an exhibit that, as the court of appeals found (Pet. App. 7a), showed that "in the General Assembly, Electrical Assembly and Refrigerator Assembly job classifications, the jobs appear to be segregated by sex and that the female jobs start at $.20 an hour less than the male jobs and end almost $.90 per hour less." Part VII of the affirmative action program, Keco's workforce analysis, stated (J.A. 85) that in 1970, Keco's office and clerical workforce was "predominated by females, with 86.36% of * * * this category being female" whereas only "9.09% of [the Officials and Managers] category are female." Thus, the program noted (*ibid.*) "a definite under-utilization of * * * female employees" in the Officials and Managers category. See Pet. App. 7a.

After the investigation was completed, the Commission's regional director found, *inter alia* (J.A. 99), that Grimes and a female who had replaced her had been paid, respectively, $200 and $275 per month less than a male who performed substantially the same job, and that assembly jobs at Keco were segregated according to sex, with a concomitant wage rate schedule that was higher for male employees than for female employees. The Commission adopted the regional director's findings (J.A. 104-105).

2. When conciliation efforts failed, the Commission brought this action, alleging that Keco had violated Title

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[2]References to "J.A." are to the joint appendix filed in the court of appeals.

VII by maintaining sex-segregated job classifications, by failing to pay women on the same basis as men, by assigning women to lower paying clerical jobs and refusing to promote them to management and supervisory jobs, and by maintaining job classifications segregated on the basis of sex (Pet. App. 3a). The Commission also alleged that Keco had violated Title VII by failing to file annual reports required by Commission regulations (*ibid.*).

The Commission's action, which sought relief for women as a class and an injunction requiring Keco to file the reports, was consolidated with an individual Title VII action previously filed by Lena Grimes (Pet. App. 2a-4a). The district court entered summary judgment dismissing the Commission's action (Pet. App. 11a-12a) and denied the Commission's motion to reconsider on the ground (Pet. App. 14a) that the Commission's investigation had "produced nothing to warrant the allegations of the EEOC complaint * * * extending beyond the Grimes charge" (*ibid.*).

The court of appeals held (Pet. App. 8a) that the district court had erred in awarding summary judgment "since the record does disclose material issues of fact [broader than the Grimes charge]." Specifically, the court found (Pet. App. 4a, 8a) that the record revealed factual disputes regarding whether Keco had filed the proper reports with the EEOC and whether Keco maintained a sex-segregated job classification in its assembly classifications. Accordingly, the court of appeals reversed and remanded the action to the district court.

ARGUMENT

1. This case involves the application of well established principles of summary judgment law. The court of appeals

recognized that the Commission may bring an enforcement action for class-wide relief on behalf of women based on violations discovered during a reasonable investigation of a charge filed by a private party. *General Telephone Company of the Northwest, Inc.* v. *EEOC*, No. 79-488 (May 12, 1980), slip op. 12; see *Occidental Life Insurance Co.* v. *EEOC*, 432 U.S. 355, 372 & n.32 (1977). The Commission also may seek an injunction compelling an employer to file required reports. See Section 709(c) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-8(c). The court of appeals thus properly reversed the grant of summary judgment and remanded the cause for trial because the record disclosed factual disputes concerning the breadth of the sex discrimination found by the Commission's investigation and the employer's alleged failure to file the required reports. In these circumstances, further review is not warranted.

2. Keco does not dispute the court of appeals' interpretation of the law or the record. Instead, it appears to argue (Pet. 8-10) that this Court's decisions in *United Steelworkers of America* v. *Weber*, 443 U.S. 193 (1979), and *Fullilove* v. *Klutznick*, No. 78-1007 (July 2, 1980) (plurality opinion), preclude the use of information contained in an affirmative action program as evidence in an EEOC sex discrimination suit.

a. This contention is not properly before the Court. In neither the district court nor the court of appeals did Keco argue that the Commission would be precluded from using in its enforcement action information ascertained from Keco's affirmative action program. Rather, it argued only that the Commission had not discovered *any* evidence of sex discrimination beyond that contained in the Grimes charge. In response to the Commission's reliance, before the court of appeals, on the information contained in Keco's affirmative action

program, Keco argued only (Brief for Appellee filed in the court of appeals at 7) that such information was "in no way prejudicial" to it. Having failed to raise the contention below, Keco cannot, in the first instance, present it to this Court. See *Dothard* v. *Rawlinson*, 433 U.S. 321, 323 n.1 (1977); *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 163-164 (1975); *Adickes* v. *Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

b. In any event, nothing in *Weber*, *supra*, or *Fullilove*, *supra*, suggests that an employer's adoption of an affirmative action program designed to benefit minority group members can shield the employer from a Title VII action seeking relief on behalf of women.

Nor does government approval of Keco's 1970 affirmative action program in favor of minorities have any bearing on the merits of the Commission's present claim of sex discrimination by Keco. In 1970, regulations issued under Exec. Order No. 11246, *supra,* only required contractors to develop affirmative action programs for minorities (Pet. App. 30a-32a, 36a-38a). Affirmative action for women was limited to requiring government contractors to make a general affirmation that employment decisions would not be based on sex (Pet. App. 40a-41a), to recruit women to apply for jobs from which they previously had been excluded (OFCC, Sex Discrimination Guidelines, 41 C.F.R. 60-20.6, 35 Fed. Reg. 8889 (1970)), and to include women candidates in management trainee programs (*ibid.*). Government approval of Keco's 1970 affirmative action program therefore has no relevance to the claim of sex discrimination asserted in this case (see pages 2-3, *supra*).[3]

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[3]In informing Keco that its affirmative action program complied with Revised Order No. 4, the Defense Supply Agency had noted that "[y]our concern with the utilization of *minority* group persons * * * is sincerely appreciated" (Pet. 4; emphasis added).

c. Moreover, affirmative action programs and workforce analyses are not privileged; no statute or rule of evidence precludes their use in judicial proceedings where the information they contain is relevant. Indeed, government contractors prepare them with the knowledge that they may be used to disqualify them from receiving government contracts on the ground of noncompliance with Exec. Order No. 11246, *supra*. No public policy prevents the use of such documents as evidence of noncompliance with Title VII, a statute that complements the mandates of the Executive Order.[4]

Finally, in the present case, Keco voluntarily supplied the Commission and the courts below with a copy of its workforce analysis in an attempt to demonstrate that it does not discriminate. Thus, even if there were a privilege against the use of such a document as evidence in an EEOC proceeding, Keco waived the protection thereof by voluntarily submitting the program to the Commission and the courts below. Cf. *United States* v. *Miller*, 425 U.S. 435, 442-443 (1976); *Zap* v. *United States*, 328 U.S. 624, 628-630 (1946).

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[4]The federal interest in enforcing these overlapping provisions has resulted in liberal exchanges of information, including affirmative action plans and workforce analyses, between the Commission and the Department of Labor's Office of Federal Contract Compliance Programs. See Memorandum of Understanding, 39 Fed. Reg. 35855-35856 (1974). The informational exchange provided for in the Memorandum of Understanding has been upheld by the courts. *Emerson Electric Co.* v. *Schlesinger*, 609 F. 2d 898 (8th Cir. 1979); *Reynolds Metals Co.* v. *Rumsfeld*, 417 F. Supp. 365 (E.D. Va. 1976), aff'd in relevant part, 564 F. 2d 663 (4th Cir. 1977), cert. denied, 435 U.S. 995 (1978).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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